

Memorandum 99-54

Withdrawal of Prejudgment Deposit in Eminent Domain

Article I, Section 19, of the California Constitution enables the condemnor in an eminent domain proceeding to take immediate possession of the property. “The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.”

The Legislature has responded with a well-articulated scheme for prejudgment deposit by the condemnor, withdrawal by the property owner, and possession by the condemnor. Code Civ. Proc. §§ 1255.010-1255.480. This scheme was enacted on recommendation of the Law Revision Commission.

Our consultant, Gideon Kanner, points out an anomaly in the statutory scheme where one of several persons having an interest in the property being taken seeks to withdraw the deposit.

The Eminent Domain Law anticipates the possibility of multiple or divided ownership of the property. If the property owner makes application to the court to withdraw the deposit, the condemnor may object on the basis that other parties to the proceeding are known or believed to have interests in the property. Code Civ. Proc. § 1255.230(b). The condemnor may serve notice on the other parties, who have an opportunity to appear and object to the withdrawal, in which case the court determines the amounts to be withdrawn, if any, and by whom. Code Civ. Proc. § 1255.230(c)-(d). The court may order a withdrawing party to give security to the other parties to cover the possibility of an overwithdrawal. Code Civ. Proc. § 1255.240. Thereafter, the parties have no further claim against the condemnor to the extent of the amount withdrawn; the remedies for excess amounts withdrawn are between the parties. Code Civ. Proc. § 1255.280.

The anomaly occurs under Section 1255.230(c). If the condemnor objects to the property owner’s withdrawal on the basis that other parties have an interest in the deposited funds, the condemnor must serve notice on the other parties:

If an objection is filed on the ground that other parties are known or believed to have interests in the property, the plaintiff shall serve or attempt to serve on such other parties a notice that they may appear within 10 days after such service and object to the withdrawal. **The notice shall advise such parties that their failure to object will result in waiver of any rights against the plaintiff to the extent of the amount withdrawn.** The notice shall be served in the manner provided in Section 1255.450 for service of an order for possession. The plaintiff shall file, and serve on the applicant, a report setting forth (1) the names of the parties upon whom the notice was served and the dates of service and (2) the names and last known addresses of the other parties who are known or believed to have interests in the property but who were not so served. The applicant may serve parties whom the plaintiff has been unable to serve. **Parties served in the manner provided in Section 1255.450 shall have no claim against the plaintiff for compensation to the extent of the amount withdrawn by all applicants.** The plaintiff shall remain liable to parties having an interest of record who are not so served but, if such liability is enforced, the plaintiff shall be subrogated to the rights of such parties under Section 1255.280.

The anomaly here is that the notice advises third parties that their failure to object to the withdrawal waives their rights against the condemnor to the extent of the amount withdrawn. But it doesn't tell them that even if they do object, they have no claim against the condemnor to the extent of the amount withdrawn.

Mr. Kanner is concerned that this provision is a trap for a third party who may be misled to believe that the filing of an objection will preserve the party's rights. Mr. Kanner suggests that the legislative intent of this provision, inartfully drafted, is that the third party's objection should preserve its rights against the condemnor.

The simplest cure for the anomalous statutory drafting would be to effectuate substantively what the notice tells the third party — default waives rights:

If an objection is filed on the ground that other parties are known or believed to have interests in the property, the plaintiff shall serve or attempt to serve on such other parties a notice that they may appear within 10 days after such service and object to the withdrawal. **The notice shall advise such parties that their failure to object will result in waiver of any rights against the plaintiff to the extent of the amount withdrawn.** The notice shall be served in the manner provided in Section 1255.450 for service of an order for

possession. The plaintiff shall file, and serve on the applicant, a report setting forth (1) the names of the parties upon whom the notice was served and the dates of service and (2) the names and last known addresses of the other parties who are known or believed to have interests in the property but who were not so served. The applicant may serve parties whom the plaintiff has been unable to serve. **Parties served in the manner provided in Section 1255.450 who fail to appear within 10 days after service and object to the withdrawal shall have no claim against the plaintiff for compensation to the extent of the amount withdrawn by all applicants.** The plaintiff shall remain liable to parties having an interest of record who are not so served but, if such liability is enforced, the plaintiff shall be subrogated to the rights of such parties under Section 1255.280.

Once we do this, though, we must still address the question of the law governing the rights of an objecting party. An objecting party has the opportunity to protect its rights in court. “If any party objects to the withdrawal, or if the plaintiff so requests, the court shall determine, upon hearing, the amounts to be withdrawn, if any, and by whom.” Code Civ. Proc. § 1255.230(d).

Once the court determines the proportionate amounts of the deposit to be withdrawn by the parties, what remedies are available to a third party who is ultimately found to have a greater interest in the condemnation award? The answer given by the eminent domain law is that the party who overwithdrew is responsible for reimbursement. “Any amount withdrawn by a party pursuant to this article in excess of the amount to which he is entitled as finally determined in the eminent domain proceeding shall be paid to the parties entitled thereto. The court shall enter judgment accordingly.” Code Civ. Proc. § 1255.280(a).

But suppose the party who received the excessive compensation is now judgment-proof? The eminent domain law anticipates this eventuality by enabling the court to require the withdrawing party to give security to the other parties at the time of the withdrawal. Code Civ. Proc. § 1255.240.

But suppose the court order allows overwithdrawal by a party, fails to require security, and the party is now judgment proof. What is the remedy of the third party who has not received just compensation? As between two innocent parties — the condemnor and the third party, both of which have acted properly — who should bear the risk of loss?

Mr. Kanner argues for liability of the condemnor as the most appropriate party to bear the risk, for a number of reasons:

(1) The eminent domain proceeding is for the benefit of the condemnor — which is the only party that wants and benefits from the acquisition of the property.

(2) The condemnor may be the only party to the proceeding with the resources to cover the risk — the property owners ordinarily do not have the resources, and in fact their financial position is typically worsened by the proceeding.

(3) The condemnor is the only party in a position to spread the risk — it acts on behalf of the public, for the public benefit, and the public can pay the acquisition costs.

(4) The condemnor has precipitated this problem by seeking immediate possession of the property rather than going through normal condemnation procedures. Immediate possession is for the convenience in planning and scheduling of the condemnor, which should pay for any costs associated with that convenience.

The staff does not know how common it is for an actual problem to arise in practice. The situation will only come about where (1) there is an overwithdrawal, (2) the overwithdrawal is ordered by the court over the objection of a third party, (3) no security is required, and (4) the withdrawing party becomes judgment proof. This combination of circumstances must be fairly rare.

Rather than allowing a windfall to the overwithdrawing party (and either sticking the third party with the loss or saddling the condemnor with added costs), **a better approach might be to make security for withdrawal mandatory on demand of the third party.** This would involve some bonding expense to the withdrawing party, but the bond is a recoverable cost. Code Civ. Proc. §§ 1255.240(b), 1268.710. A provision along these lines would be simple to effectuate:

Code Civ. Proc. § 1255.240 (amended). Security where conflicting claims to amount withdrawn

1255.240. (a) If the court determines that an applicant is entitled to withdraw any portion of a deposit that another party claims or to which another person may be entitled, the court may, and on demand of a party shall, require the applicant, before withdrawing such portion, to file an undertaking. The undertaking shall secure payment to such party or person of any amount withdrawn that exceeds the amount to which the applicant is entitled as finally

determined in the proceeding, together with interest as provided in Section 1255.280. If withdrawal is permitted notwithstanding the lack of personal service of the application for withdrawal upon any party to the proceeding, the court may also require that the undertaking indemnify the plaintiff against any liability it may incur under Section 1255.230. The undertaking shall be in such amount as is fixed by the court, but if executed by an admitted surety insurer the amount shall not exceed the portion claimed by the adverse claimant or appearing to belong to another person. If executed by two or more sufficient sureties, the amount shall not exceed double such portion.

(b) If the undertaking is required primarily because of an issue as to title between the applicant and another party or person, the applicant filing the undertaking is not entitled to recover the premium reasonably paid for the undertaking as a part of the recoverable costs in the eminent domain proceeding.

An alternative solution might be to provide for an interlocutory appeal or writ and immediate resolution of the apportionment issue. While this could result in some delay, resolution of the dispute would not have to wait until the conclusion of a perhaps lengthy proceeding and possible reapportionment of the money previously withdrawn. (It is worth noting in this connection that eminent domain proceedings are entitled to a statutory priority over other civil actions. Code Civ. Proc. § 1260.010.)

The Commission needs to decide what, if anything, should be done to address the issue.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary